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Supreme Court, U.S.
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No. 08- 08-101 MAY 13 2008

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IN THE

Supreme Court of the United States

ELMER VAN GORDER,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit improperly and erroneously determined the jury question of "reasonableness" with regards to railroad equipment safety inspections pursuant to the Federal Employers' Liability Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated December 11, 2007, is officially reported at 509 F.3d 265, and is reproduced at Appendix A.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan at Detroit, dated September 27, 2006, is unofficially reported at 2006 U.S. Dist. LEXIS 70181, and is reproduced at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on December 11, 2007. Petitioner filed a timely Petition for Rehearing En Banc in the lower court and the lower court denied said petition on February 20, 2008 (Appendix C). This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51 *et seq.*

28 U.S.C. § 2101(c)

28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

Petitioner, Elmer Van Gorder, commenced this action, in the U.S. District Court for the Eastern District of Michigan Southern Division, against Defendant, Grand Trunk Western Railroad, under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* for injuries sustained during the course of his employment.

Petitioner was employed by Defendant, Grand Trunk, as a carman working out of Defendant's Flint Yard. Petitioner's accident occurred on October 17, 2003, when, in the course of his duties, he was required to place bridge plates between bi-level cars and subsequently, close the door of the railcars, which had been delivered to the loading dock. When Petitioner attempted to close the clamshell doors of bi-level car, TTGX985596, the door suddenly jammed and stopped and as a result, Petitioner sustained serious and painful injuries.

Following his accident, Petitioner reported the incident to the foreman. Subsequently, a mechanical inspection of the railcar was completed by Defendant's management employees, Robert F. Miller, Car Foreman, John P. Jaques, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey and Risk Mitigation Officer David Cromie. The inspection revealed that the canopy bolt on the top of the cars AR door was worn and defective. This defective bolt caused the door to become stuck during closing.

Prior to Petitioner's accident, Defendant conducted two separate inspections of the railcar. However, Defendant did not discover the defective bolt during either inspection. Following Petitioner's accident, a more thorough inspection of the railcar was conducted. This more thorough inspection involved both opening and closing the doors and through this inspection Defendant found that the canopy bolt was worn and defective.

Petitioner commenced the present action on January 13, 2005, on the basis that Defendant failed to provide him a safe place to work under the FELA. On November 30, 2005, Defendant filed a Motion for Summary Judgment, based on the alleged lack of actual or constructive notice of the defective condition of the clamshell door.

In response to the Motion for Summary Judgment, Petitioner submitted his own sworn testimony as to the occurrences on the day of the accident, and his experiences performing safety inspections as a long time railroad employee. This included sworn testimony that when he had previously performed said inspections he would open and close the doors, thereby, discovering any defects. Petitioner also submitted the sworn expert affidavit of Michael Micek, a former governmental inspector and equipment supervisor for the Federal Railroad Administration (hereinafter "FRA"). Mr. Micek's sworn affidavit indicates that FRA rules and regulations regarding the inspection of equipment require that a car cannot be put into service unless it is 100% defect free; and that had Defendant conducted a thorough and proper inspection of the railcar, the defective and worn bolt would have been discovered prior to Petitioner's injury.

The District Court granted Defendant's Motion for Summary Judgment. In its decision, the District Court held that Petitioner failed to establish a claim of negligence and specifically, had not set forth a specific industry standard as to railcar inspection. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the grounds that the record "does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door." *Van Gorder v. Grand Trunk W. Ry.*, No. 06-2451 U.S. Dist. LEXIS 28555 at *14 (6th Cir. 2007). Petitioner filed a Petition for Rehearing en banc of the Sixth Circuit's Decision on December 22, 2007. The Sixth Circuit subsequently denied the Petition for Rehearing on February 20, 2008.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's Decision ("Decision") affirming the order of summary judgment in favor of Respondent Grand Trunk Western Railroad ("Grand Trunk") is in conflict with other decisions of the United States Court of Appeals for the Sixth Circuit and opinions of the Supreme Court. The issue at hand is a question of great importance and consideration by the Supreme Court is necessary to secure and maintain uniformity of decisions of the Circuit Courts. The Decision is in conflict with *Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803 (6th Cir. 1996) where the Decision analyzes the quantum of evidence in the record as needed to survive summary judgment under the Federal Employer's Liability Act. Great deference is given to the jury in cases under Federal Employer's Liability Act. The Decision is in direct

conflict with *Aparicio* and other Circuit cases finding that a Federal Employers' Liability Act Petitioner shall withstand a motion for judgment as a matter of law by presenting more than a scintilla of evidence.

The lower court correctly determined that it "must decide only whether Grand Trunk conducted a reasonable inspection and exercised ordinary care". The court erred in finding that the Petitioner did not "present[ ] evidence and the record does not contain evidence sufficient to permit a reasonable jury to find that Grand Trunk's failure to require closing the door as part of the pre-trip inspection of the care made that inspection unreasonable." The Decision fully ignores the Petitioner's own sworn testimony in his capacity as an experienced carman with regard to reasonable inspections by the railroad consisting of both opening and closing the door of the car. This testimony raises a question of fact. Moreover, the affidavit of the Petitioner's expert witness, Michael Micek, raises a question of fact as to whether the Defendant's inspections of the railcar were reasonable. These factual questions should be decided by a jury at trial, not the court, as such is the standard for Federal Employers' Liability Act actions in the Sixth Circuit.

ARGUMENT

The Petitioner Presented Sufficient Evidence To Establish A Question Of Fact For The Jury To Resolve Regarding Whether Defendant Conducted A Reasonable Inspection And Exercised Ordinary Care.

In affirming the District Court's order granting summary judgment in favor of the Grand Trunk, the lower court's opinion is in conflict with its decision in *Aparicio v. Norfolk & W. Ry.*, Sixth Circuit decisions, and other circuit decisions regarding whether a railroad acted as a reasonably prudent employer pursuant to the FELA.

Congress intended that cases predicated upon the FELA be resolved by the jury, not the court, as greater deference is given to the jury's interpretation of the facts in FELA cases than ordinary negligence actions. *Basinger v. CSX Transp.*, No. 94-3908 U.S. App. LEXIS 19139 at *13 (6th Cir. 1996); *Richards v. CONRAIL*, 330 F.3d 428, 434 (6th Cir. 2003) (citing *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir. 1976)). The Supreme Court has noted that the right to a determination by jury is a basic, fundamental right guaranteed by the federal system of jurisprudence and thus, is "part and parcel of the remedy afforded railroad workers under the [Federal] Employers Liability Act." *Bailey v. Central Vt. Ry.* 319 U.S. 350, 354 (1943).

> Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury

> determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases — whether employer fault played any part in the employee's mishap.

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 508-509 (1957).

> It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35 (1943).

The Sixth Circuit noted that,

> Courts have struggled with the question of whether a Federal Employers' Liability Act Petitioner need present only slight evidence or a scintilla of evidence as to each element of his or her claim in order to withstand a motion for

> judgment as a matter of law, or whether a Petitioner must present something more than that.

Aparicio v. Norfolk & W. Ry., 84 F.3d 803, 808 (6th Cir. 1990).

The court concluded that, even in light of the conflicting Circuit Courts' opinions, a Petitioner must present more than a *scintilla* of evidence to prove that a railroad breached by failing to provide a safe working environment if it knew or should have known that it was not acting adequately to protect the Petitioner-employee. *See Aparicio*, 84 F.3d at 810-812; *see also Urie v. Thompson*, 337 U.S. 163, 178 (1949). In *Aparicio*, the Petitioner, who suffered from carpal tunnel syndrome as a result of a number of years of employment with the railroad, filed suit under the FELA. The District Court granted the defendant railroad's motions for summary judgment and judgment as a matter of law.

The Defendant railroad argued that it did not breach its duty to the Petitioner, as there were no specific standards regarding ergonomics set forth by the FRA. The lower court reversed the decision of the district court and held that the Petitioner had provided a bit more than a scintilla of evidence that his injuries were due to his employment with the railroad. Moreover, the lower court found that,

> The fact that a regulatory body has not issued any applicable ergonomic standards does not relieve Norfolk & Western of its duty to provide a workplace safe from foreseeable conditions, which might pose a danger to its workers.

Id. at 811.

Similarly, in this case, there is no specific industry standard for inspection of the door mechanisms of the railcar involved. Rather, as the lower court outlined in *Aparicio*, the standard is whether Defendant acted as a reasonably prudent employer. Specifically, Defendant knew or should have known about the defective door of the railcar if the two prior inspections were reasonable. Thus, there is question of fact for a jury as to whether these were proper and reasonable inspections of the railcar. To rule otherwise puts this decision in conflict with *Aparicio* and other Sixth Circuit cases. *See also Wilhelm v. CSX Transp., Inc.*, 65 Fed. Appx. 973 (6th Cir. 2003); *Bowe v. CONRAIL*, No. 99-4091 U.S. App. LEXIS 24866 (6th Cir. 2000); *Frazier v. CSX Transp., Inc.*, No. 97-3028 U.S. App. LEXIS 17117 (6th Cir. 1998); *Miller v Cincinnati, N.O. & T. P. R. Co.*, 203 F. Supp. 107 (E.D. Tenn. 1962). Upon the proof of the existence of defective equipment in the custody and control of the defendant at the time of the Petitioner's injury, it is a matter for the jury to say whether the defendant should have known of this condition by reasonable inspections or otherwise. *Miller*, 203 F. Supp. at 113.

The lower court agreed that Grand Trunk had "a duty to exercise reasonable care to protect Van Gorder, an employee". *Van Gorder v. Grand Trunk W. Ry.*, No. 06-2451 U.S. Dist. LEXIS 28555, *10 (6th Cir. 2007). However, the Decision goes on to state that Van Gorder cannot show that Grand Trunk breached that duty, failing to consider the all evidence presented in the record. Specifically, the Decision claims, "Van Gorder relies almost exclusively on the sworn affidavit of his purported expert, Michael Micek" *Id.* Not only did the Court choose to overlook the additional evidence

presented and contained in the record, but the lower court mistakenly ignored the Petitioner's own sworn testimony, which raises a question of fact. The lower court failed to consider the Petitioner's submitted evidence supporting his claim that that Defendant's alleged inspections were insufficient and unreasonable. In his sworn testimony, the Petitioner properly established, through his own prior experience of railcar inspection, that the opening and closing of the clamshell doors was customary in inspecting railcars. *See generally*, *Bowe v. CONRAIL*, No. 99-4091 U.S. App. LEXIS 24866 (6th Cir. 2000) (In a chemical exposure case, the court found that even where the Petitioner's expert witness testimony on causation was excluded, the "slim" evidence consisting of the Petitioner's own testimony and his medical report was sufficient to permit the case to survive summary judgment). Van Gorder's testimony raises a question of fact regarding whether the alleged prior inspections were reasonable. Inexplicably, his testimony was not mentioned in the lower court's Decision, which is now in conflict with *Aparicio*.

The Credibility Of Petitioner's Expert Witness Michael Micek And The Evidence Presented Through His Expert Testimony Should Be Weighed By The Jury, Not The Lower Court.

In *Aparicio*, the testimony of Dr. Robert Andres, the Petitioner's ergonomics expert, showed the ergonomic risk factors and remedial measures accepted in the scientific community. The court found that

> A jury could accept Dr. Andres' testimony and find that a reasonably prudent employer

> would have known about the risk factors and taken steps to ameliorate them.

Aparicio, 84 F.3d at 811.

Likewise, in the present case, the credibility and testimony of expert witness, Michael Micek should be weighed by the jury. The Court referred to Petitioner's expert witness Michael Micek, as a "purported expert", without due consideration of Mr. Micek's vast experience and qualifications as an inspector and equipment supervisor for the Federal Railroad Administration. Mr. Micek has twenty-three years of experience as a motive power and equipment inspector, motive power and equipment supervisory specialist and motive power and equipment supervisor for the United States Government as an employee of the Federal Railroad Administration. Mr. Micek has fourteen years of railroad experience as a carman and motive power and equipment supervisor whose duties included repair and inspection. Mr. Micek received numerous awards bestowed upon him by the Federal Railroad Administration, which include, but are not limited to, several Administrators Superior Achievement, Performance, and Team awards.

Mr. Micek's credentials were not challenged by the Defendant. Any apparent difficulties with his opinions are subject to cross-examination at trial. Mr. Micek was qualified to provide the expert opinion that the Defendant knew or should have known of the defect of the subject railcar prior to the injury of Petitioner. Mr. Micek opined that through his vast experience in the railroad industry, including twenty-three years with the FRA, a proper and reasonable inspection should have revealed a defect such as this.

In his expert affidavit before the District Court, Mr. Micek indicated that the use of a manlift was not the only method of inspecting for the worn canopy bolt as claimed by Defendant. Notably, this estimation is confirmed by Robert Miller and John Jaques and thus, the Petitioner is not relying on the expert affidavit solely. It is for the jury to determine whether the manlift was reasonable inspection by which the Defendant should have been aware of the defect. *Miller*, 203 F. Supp. at 113.

Mr. Micek also stated that, alternatively, the Defendant could have utilized the side ladders located on the railcar to inspect the top of railcar. Although the Decision states that the defective bolt was not visible from any angle, Mr. Jaques confirmed Mr. Micek's assessment in his testimony that if the car inspectors had gone on top of the roof, they would have also noticed this defective bolt. The Court found that climbing to an "upper most height" would be dangerous without the proper safety equipment. Climbing to an upper most height with proper safety equipment to observe hazardous conditions that might be otherwise undetectable may be reasonable to provide a safe workplace for railroad employees. It is a question for the jury whether a climbing inspection is reasonable. It is also questionable as to why, if a climbing inspection is reasonable, would the Defendant not provide proper safety equipment.

In addition to this alternative measure, it has been previously established that Defendant could have simply closed the door to complete the inspection. It was for the jury to determine whether utilizing the ladder the side ladders to inspect the top of the railcar or closing the doors are reasonable in this context. *Miller*, 203 F. Supp. at 113.

Mr. Micek's affidavit, Mr. Jaques's testimony, and the Petitioner's testimony create questions of fact regarding the means and methods of the prior inspections. The lower court's opinion states that Mr. Micek was unable to explain what would have constituted a proper inspection. The aforementioned evidence does not support this conclusion. The lower court goes on further stating that, "to observe the defect, Grand Trunk had to take the door apart". *Van Gorder*, at *11. The evidence presented by the Petitioner supports the conclusion that the Defendant could have observed the defect simply by closing the door. In fact, during the hearing regarding Defendant's Motion for Summary Judgment, Judge Rosen noted that Mr. Jaques had admitted in his deposition testimony that the act of closing the door would have revealed the defect and inquired as to why the reasonable inspection did not involve closing the door. It is reasonable to consider that the mere task of closing the door once it has been opened is an appropriate method of inspection. On this issue, the Petitioner has presented more than a scintilla of evidence through not only the expert opinion of Mr. Micek but additional evidence presented through the testimony of the Petitioner himself, Robert Miller and the affidavit of John Jaques. Again, the Petitioner has raised a question of fact to be resolved by the jury, not the Court, as greater deference is given to the jury's interpretation of the facts in FELA cases than ordinary negligence actions.

Finally, the Defendant has not presented any admissible evidence regarding its two previous alleged inspections. The only evidence that these inspections took place is through testimony of supervisors and not the alleged inspectors themselves. The credibility of these alleged inspections as well as of Mr. Van Gorder and Mr. Micek are issues to be weighed by a jury. *See Aparicio*, 84 F.3d at 812. Judge Rosen also restates the complexities of railcar inspection and the unclear nature of the procedures utilized by Grand Trunk by stating, "[i]nspection of the cars is a multi-step process that is inconsistent in its execution and is not entirely clear from the testimony of record." Therefore, a question of fact exists as to whether these inspections even took place and whether they were reasonable and proper. This clearly presents a question of fact as to whether these inspections were thorough and reasonable to satisfy Defendant's duty to provide Petitioner with a safe place to work as outlined in *Aparicio*, 84 F.3d 803.

The lower court's Decision conflicts with *Aparicio* and establishes a new non-jury standard under the FELA for determining whether the Defendant knew or should have known about a defective condition through reasonable inspections or otherwise, and if the inspection was, in fact, reasonable. It also establishes a new interpretation of the employers' duty under the FELA to adequately protect their employees. This court has ruled on questions of fact for the jury. Consideration by the Supreme Court is necessary to maintain uniformity among the circuit courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted it is necessary to maintain the uniformity of circuit court decisions pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

Respectfully submitted,

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